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In The

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, OHIO, et al.,

Petitioners,

vs.

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICI CURIAE*, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE CITY OF GARLAND, TEXAS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The International Municipal Lawyers Association ("IMLA") and the City of Garland, Texas, as *amici curiae*, file this brief in support of the Petitioners, the City of Cuyahoga Falls, Ohio, *et al.*[1]

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has supported the interests of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties regarding the filing of this brief have been filed with the Clerk. In accordance with this Court's Rule 37.6, *amici curiae* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

that affect them. IMLA has appeared as an *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The City of Garland, Texas is a home-rule municipality located in Dallas County, Texas. The charter of the City of Garland, like that of the City of Cuyahoga Falls, contains initiative and referendum provisions that offer the people an opportunity to directly engage in the democratic process through the exercise of their right to vote. And, like the charter provision at issue in this case, the City of Garland's charter provides that the certification of an issue for a vote by referendum stays the effectiveness of the ordinance that is the subject of the referendum until a vote on the referendum is obtained.

Amici curiae are especially interested in this case because, on the most elemental level, the City of Cuyahoga Falls is facing liability simply because its citizens made use of the referendum process – notwithstanding that the elected and appointed officials of Cuyahoga Falls did everything that the plaintiffs expected of them short of ignoring the Cuyahoga Falls municipal charter. If the reasoning of the Sixth Circuit Court of Appeals is allowed to stand, the causation and attribution principles expressed by this Court in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978) and as recurrently reaffirmed in its progeny, must necessarily be abandoned, to be replaced by an astonishingly expansive theory of liability under which a municipality may be liable if *anyone* in *any way* connected with the municipality acts in an unconstitutional manner. In that vein, *amici* are vitally interested in the outcome of this case.

SUMMARY OF THE ARGUMENT

At a prefatory glance, this case appears to invite the Court to explore new territory in the realm of municipal liability pitting, as the case seems to do, the constitutional rights of a property owner (bolstered by the statutory rights provided by the Fair Housing Act, 42 U.S.C. §3601, *et seq.*) against the rights of the people to engage in some of the most fundamental aspects of democracy, including the right to freely speak one's mind in a public forum, and to participate in a public election. This Court need not, however, fall prey to the temptation to analyze this case on that level. At bottom, this case is simply not that complicated; it does not require this Court to determine any difficult questions of municipal liability under Section 1983 or to express any novel principles about the reach of the Fair Housing Act with respect to municipal defendants. Under the well-established tenets of Section 1983 municipal liability and based upon the plain language of the Fair Housing Act, the district court's judgment may, and should be, affirmed.

ARGUMENT

1. The limited nature of Respondents' injury.

Respondents' ultimate complaint in this case is that certain citizens of Cuyahoga Falls invoked the referendum provisions of their city's charter thereby occasioning a delay in the issuance of the building permit needed to construct Respondent's proposed housing project. That is necessarily the gist of Respondents' grievance because, except for obeying the clear language of the City's charter and laws, the City did everything that Respondents had

asked. Only the intervening circumstance of the referendum petition stood in the way of Respondents.

Respondents needed to obtain a site plan in order to commence building their housing project. Their first step was getting a recommendation of approval for their site plan by the City of Cuyahoga Falls[2] Planning Commission. The Planning Commission did just that. The Respondents' next step was getting the Planning Commission's recommendation approved by the City Council. Again, the Respondents got what they wanted from the City. Rather than bow to the pressure of community opposition, the City Council accepted the Planning Commission's recommendation and likewise approved Respondents' application. There appears to be no dispute that absent anything else the City would have issued a building permit immediately upon the approval of the site plan and Respondents' compliance with the preliminary (and uncontested) conditions of that approval. And, after all was said and done, that is just what happened. As soon as no legal impediment stood between the City Council's approval of Respondents' site plan and the issuance of a building permit, the City issued that permit and Respondents began the construction of their housing project.

Thus, what Respondents are really left to complain about is the citizens' invocation of a referendum to challenge the City's approval of Respondents' site plan. As is the case with many municipal referendum provisions, the Cuyahoga Falls city charter provides that once a

[2] Where the context allows, for brevity the various Petitioners will be collectively referred to herein as "the City".

referendum petition has become effective, the ordinance against which the referendum is directed is stayed pending a vote of the people. *See*, 5 E. McQuillin, Law of Municipal Corporations §16.53 (3d Ed. 1996) (describing purpose and effect of referendum procedures). The referendum petition effectively suspended the City's approval of Respondents' site plan. Until it was determined as a matter of state law that the people of Ohio may not use the power of referendum to overturn administrative – as opposed to legislative – actions, the approvals sought by Respondents and granted by the City could not go into effect.

2. Any constitutional harm suffered by Respondents was not caused by nor otherwise attributable to the City under Section 1983.

Assuming, for the sake of argument, that the delay resulting from the resolution of the referendum issue produced actionable harm to the Respondents, the only question presented to this Court is whether that supposed harm is fairly attributable to the City. Under the fault and causation standards consistently employed by this Court in the context of civil rights actions under 42 U.S.C. §1983, the City cannot be liable. Similarly, under the Fair Housing Act, it cannot be said that any action on the part of the City denied or made unavailable a dwelling to the Respondents because of race.

Under *Monell* and subsequent cases, this Court requires a plaintiff seeking to impose liability on a municipality under Section 1983 to identify a municipal "policy" or "custom" that caused the plaintiff's injury. *See, Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 at 694 (1978), *Pembaur v. City of Cincinnati*, 475 U.S.

469 at 480-81 (1986), *and City of Canton, Ohio v. Harris*, 489 U.S. 378 at 389 (1989). The reason for requiring a plaintiff to locate a distinct policy is that it ensures that a municipality is held liable only for those constitutional deprivations that result from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 97 at 403 (1997).

Even if a policy chargeable to the municipality is identified, liability under Section 1983 is not established until that policy is shown to be the cause of the plaintiff's injury. "[I]t is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* at 405 (emphasis in original).

The court of appeals did not engage in the sort of elementary, but indispensable, analysis of attribution and causation as described above. Had it done so, it would have had to come to the conclusion that the moving force behind Respondents' harm – the referendum – could not be fairly attributed to the City. The supporters of the referendum caused the delay, not the City. Contrary to what the court of appeals assumed, the City did not "give effect" to the wishes of the people. The referendum itself took care of that because the referendum stayed the effectiveness of the City's actions.

For the court of appeals to assume, as it apparently did, that City officials were free to ignore the effect of the City's referendum provision asks too much. First, there is no body of law that gives municipal officials the sort of power that the court of appeals presupposes those officials possess, that is, the ability to disregard with impunity facially constitutional, controlling state and municipal laws.[3] Second, even if municipal officials could ignore an otherwise binding law whenever there was an allegation that those who were resorting to that law were unconstitutionally motivated, there has as yet never been a *finding* that the supporters of the referendum were in fact motivated by racial animus. Indeed, Respondents survived affirmation of the district court's summary judgment only because the court of appeals determined that there were genuine issues of material fact on the question whether racial bias played a part in the story. Under those circumstances, it cannot be legitimately argued that the City was required to assume that Respondents' allegations were in fact true and then, based on those assumed facts, disregard the citizens' right to hold a referendum election.

Although the City could not and did not "give effect to" the wishes of the people, it could be argued that the Respondents' injury may still be attributed to the City because the people themselves caused that injury through

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[3] Had the City done so, the City could just as well have faced Section 1983 liability for abridging the voters' First Amendment rights to vote and associate. *See, e.g., Bonas v. Town of North Smithfield*, 265 F.3d 69 at 74 (1st Cir. 2001) ("It is certain that the right to vote – the wellspring of all rights in a democracy – is constitutionally protected. [T]his means that the right to vote in local elections (including referenda elections) is constitutionally protected."

their use of the referendum process. In a sense, the people *are* the ultimate policymakers. Thus, if the people behave unconstitutionally on their collective own, rather than through their elected representatives, would it not be just as fair (if not more so) to hold them accountable under Section 1983 the same as if their representatives had committed the wrong on the people's behalf?

Whether that theory would be tenable under our notions of representative democracy and however interesting that question may be in an abstract sense, it need not be answered in this case. The locus of "final policymaking authority" is a matter of state law. *McMillian v. Monroe County, Ala.*, 520 U.S. 781 at 786 (1997). After an about-face, the Ohio Supreme Court determined that the people of Ohio may not trump decisions of their city officials through the referendum process on administrative as opposed to legislative matters. *Buckeye Comm. Hope Foundation v. City of Cuyahoga Falls,* 82 Ohio St. 3d 539, 697 N.E.2d 181 (1998). Hence, at least with respect to the approval of site plans, the people of Cuyahoga Falls do not have final policymaking authority through the invocation of the referendum.

3. The City did not violate the Fair Housing Act.

"The [Fair Housing] Act does not mention municipalities, in fact does not say who may or may not be sued – it just says that 'it shall be unlawful' to discriminate. . . . But the cases hold or assume . . . that the Act applies to municipalities, and specifically to their zoning decisions." *Hemisphere Bldg. Co., Inc. v. Village of Richton Park,* 171 F.3d 437 at 438 (7th Cir. 1999). Whether or not the Fair Housing Act applies to the municipalities and their zoning

decisions, under the plain language of the statute, the City has done nothing to violate it.

Respondents claim that the City violated 42 U.S.C. §3404(a) of the Fair Housing Act. That section makes it unlawful to, *inter alia*, "otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. §3604(a). Even if the Fair Housing Act imposes strict liability for violations of the Act, the law clearly presupposes some causal connection between the violation and the alleged wrongdoer. Clearly the City here did nothing that would have made unavailable or denied the proposed housing project to anyone. As discussed above, the City *approved* everything that the Respondents had sought. But for the intervening of the referendum, Respondents would have had everything they wanted, when they wanted. In the end, they got what they wanted without the need to resort to the equitable remedies provided by the Act to get there. Under those circumstances, Respondents should not be allowed to use the Fair Housing Act to retroactively punish the City for something that the City did not cause and that it could not control.

CONCLUSION

Amici curiae respectfully request this Court reverse the judgment of the court of appeals and affirm the judgment of the district court.

Respectfully submitted,

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